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In the

Supreme Court of the United States

October Term, 1994

ELIZABETH RIDGEWAY, et al.,

Petitioners

vs.

PFIZER, INC., et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF IN OPPOSITION

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ARGUMENT

RESPONDENTS' ARGUMENTS AGAINST THE GRANT OF CERTIORARI ARE NOT VALID

Respondents' position boils down to the following arguments:

1. Respondents argue that the ends justify the means.

In the district court, evidence was presented establishing that the attorney for plaintiffs and the putative class (known herein as "CC") and defendants (known herein collectively as "Pfizer") colluded to achieve a settlement which won for Pfizer the elimination of tens of thousands of lawsuits based on Pfizer's defectively manufactured heart valve, and on the other hand, was calculated to provide CC with attorneys' fees in excess of $20,000,000.00. The vehicle used to accomplish these goals was the federal court and Fed.R.Civ.P. 23. The steps taken were (a) a friendly class action was filed by Pfizer's hand-picked lawyer for the plaintiffs, CC; (b) CC then forum shopped until he found a judge that he expected to not scrutinize the collusive aspects of the settlement; and, (c) the case was settled on terms that were favorable for Pfizer, but which were dressed up to appear beguiling to provide substantial benefits to the class that were much less than advertised.[1]

The case was settled with virtually no discovery having been undertaken by CC on the merits or on whether the supposed relief to the class was needed, was appropriate or was a fair trade-off for the causes of action the class members were forced to sacrifice. Moreover, CC and Pfizer insulated

[1] Confusing settlement funds, which through the use of *mumbo jumbo* in the notice to the class, created the false impression that class members are receiving benefits which they actually will not receive.

the settlement from early attacks by inducing the district court to seal the record in the case of a private conference between the court, CC and Pfizer where the settlement was discussed prior to notice, and by CC's and Pfizer's conduct in patently misleading the district court, and contravention of the requirements of Fed.R.Civ.P. 23(b)(3) about the existence of numerous other actions pending, including petitioners' putative class action pending in the State Court of Pennsylvania.

Once the district court approved the notice to the class drafted by Pfizer and CC, the district court became a militant protector of the settlement instead of a fiduciary seeking to protect the rights of absent class members. The district court thus prohibited any class member from making an *evidentiary* record about the fraud and collusive nature of the settlement, and likewise, refused to allow any evidentiary record to be made about the inadequacy of CC as the representative of the absent class members, notwithstanding the requirements of Rule 23(a)(4). In its ruling approving the settlement, the district court openly and unabashedly conceded that it was disregarding the protections provided by Rule 23 and embraced instead the view that if a class member did not like the settlement from what was disclosed in the notice to the class, his sole remedy is to withdraw from the class before the fairness hearing started or he should go along with whatever the appointed class counsel and settling defendant determine should be in the settlement.

The district court abrogated its responsibility to supervise the conduct of the proponents of a class settlement, and instead read Fed.R.Civ.P. 23(b)(3) as a license to transform the federal courts into a hotel which offers lodging to efforts by defendants being sued by thousands of consumers to unilaterally put an end to such mass litigation. On this record, respondents now argue that this court should deny review because

the settlement is adequate and class members have been waiting for the benefits of the settlement while the appeals were being decided. Respondents argue in essence that their fraud in procuring the settlement should be excused, and the violations of Fed.R.Civ.P. 23 (and the rights of the class members) pardoned.

2. Respondents argue that a 23(b)(3) class member may object at the district court level to the class certification procedure and the procedure used by the district court in certifying a class and approving a settlement, but the class member has no right to appeal the district court's decision, even if the district court committed egregious errors.

None of petitioners' appeals involved the actual merits of the settlement, although the settlement was in fact inadequate and unjustifiably favorable to Pfizer. Instead, from the time that petitioners first objected in the district court, through all of the appeals, petitioners have contended consistently that the district court erred in certifying the class and that it erred again in the procedure it used to approve the settlement. Because this is a Rule 23(b)(3) class action, petitioners had standing under Fed.R.Civ.P. 23(c)(2) to have their attorney enter an appearance and to participate in the settlement approval proceedings. Rule 23(b)(3) also gives petitioners standing to complain that CC did not satisfy the requirements of Rule 23(a)(4) and that the class did not satisfy the requirements of Rule 23(b)(3).

The district court complied in form with the requirements of Fed.R.Civ.P. 23(c)(2) when it allowed petitioners to participate as parties in the settlement approval proceedings, and to object to the class certification and the settlement. This is not a case where petitioners were merely dissatisfied with the amount of the recovery they would receive as class mem-

bers. Instead, in the district court, petitioners concentrated their arguments mainly on the fraud and collusion on the part of CC and Pfizer, and they objected to the district court's procedure, which essentially consisted of the district court's acceptance of whatever CC and Pfizer proposed on the one hand coupled with the court's adamant refusal to allow an evidentiary record to be made so that an appellate court could determine if the district court had erred. On appeal, petitioners have sought review only of the district court's procedural rulings.

Petitioners have *never* received any appellate review of their objections to the way the district court handled the class certification and the process of approving the settlement. The Court of Appeals for the Sixth Circuit actually ignored the nature of petitioners' appeals, and lumped this case improperly together with cases where class members were challenging the value of the benefits of a class settlement. The Sixth Circuit thereby avoided petitioners' challenge to the integrity of the proceedings below, and instead, the Sixth Circuit used its raw power to summarily dismiss appeals.

Respondents paint petitioners as being fanatics. In truth, the need for petitioners to run back and forth from one court to another, and for there to have been numerous appeals, resulted solely from the Sixth Circuit's insistence that the issues be presented to it in a piecemeal fashion. The Sixth Circuit rejected each effort by petitioners to consolidate the appellate proceedings. A careful review of the proceedings below establishes that at all times petitioners have sought to take the most efficient and conservative approach, but at each turn were rebuffed, with the result that petitioners were forced to spend great sums of money and time in prosecuting separate appeals, and in filing separate motions in the courts below, when all petitioners wanted was for the Sixth Circuit to

review the merits of their objections to the procedures used by the district court in certifying the class and approving the settlement.

3. Respondents argue that because the injustice visited upon petitioners by the Sixth Circuit was so great, it is not likely that any other litigants will be forced to follow the circuitous procedures imposed by the Sixth Circuit, and therefore, this case is unique and not worthy of Supreme Court review.

Respondents use as a weapon the Sixth Circuit's refusal to remediate the very circumstances it created when it forced petitioners to file separate appeals and separate motions in the court below relating to the one overriding issue pressed by petitioners: did the district court err in certifying the class and in the procedure the district court used in certifying the class and approving the settlement.

While respondents have a valid point when they argue that few cases will produce the convoluted record that was created in the courts below, respondents err when they seek to diminish the precedential value this case will have if certiorari is denied. In fact, a new rule of law has emerged from this case, and unless certiorari is granted, the protections designed by Rule 23(b)(3) will be rendered meaningless. The precedent flowing out of this case may be stated as follows:

> A defendant that makes a product that injures people around the world, and thus faces lawsuits throughout the United States and the world may *preemptively* terminate this mass litigation by finding a friendly class counsel (and court) and having a collusively obtained class settlement rubber stamped; and class members may object to this collusive settlement at the district court level, but

cannot appeal the district court's approval of its own rulings.

In light of the fact that most members of a consumer-based-Rule 23(b)(3)-class action are not trained in the law, and therefore, would not know the implications described in the abbreviated notice that usually is sent to class members, a defendant in one fell swoop, could virtually end its exposure to massive liability at a fraction of the sum it would owe to the consumers if the collusive class action and settlement were not permitted. Under the precedent of this case, the court's role has been changed from fiduciary with a duty to protect class members to that of host for the settling defendant and its cooperative, class counsel, who will be rewarded handsomely for acting as the agent of the settling defendant. Any class member who objects is now obliged to hire an attorney and file a motion to intervene in the case formally or the objecting class member will have no standing to appeal the process used by the court to accommodate the company and its chosen class counsel. Rule 23 was never intended to provide this benefit to companies or to their allies, the fortune hunting class counsel. It likewise was not designed to burden class members with formal intervention as a requirement of obtaining appellate review.

4. Respondents argue that as long as a court below accepts their distortion of the record below, respondents have a license to repeat that distortion as if it were fact.

Respondents repeat *ad nauseam* that petitioners' remedy was to opt out of the *Bowling* settlement. *Bowling v. Pfizer,* 143 F.R.D. 141 (S.D. Ohio 1992). Petitioners did not have such a remedy because petitioners are class representatives of a putative class still pending in *Taylor v. Shiley,*[2] a class action

[2] *Taylor v. Shiley,* Pennsylvania Court of Common Pleas No. 2087, Philadelphia County, February Term, 1986.

filed in the Pennsylvania State Court. The class in *Taylor* consists of 10,000 putative class members with a nexus to Pennsylvania who are all also members of the class in *Bowling*. If petitioners had not been the named class plaintiffs in *Taylor*, they would have been free to opt out as individuals from the settlement in *Bowling*. However, if petitioners had opted out of *Bowling*, the 10,000 putative class members in the *Taylor* class would have lost their representation in the *Bowling* settlement-approval-proceedings, and would have been stampeded into the impecunious *Bowling* settlement. The conditions proffered by CC and Pfizer, and ordered by the district court, required petitioners to choose between opting out and prosecuting their individual claims (and thereby abandoning the 10,000 putative class members in the *Taylor* case), or sacrificing the possibility of litigating their individual claims in the *Taylor* proceeding if the *Bowling* settlement were approved, but establishing the requisite standing for raising objections in the *Bowling* class action and settlement.[3]

Accordingly, petitioners had no choice due to the fiduciary duty that they owed as the class representatives of their putative class in *Taylor* to pursue their objections to the class certification and class settlement in *Bowling*, and petitioners were therefore obligated to refrain from opting out of the *Bowling* class action.

Respondents, therefore, distort the record by making it appear as if petitioners had the choice of opting out or staying in the *Bowling* class. More importantly, Fed.R.Civ.P. 23(b)(3) is not designed to work the way respondents and the courts below suggest. The Rule does not authorize collusive class certifications and settlements. If anything, the Rule is de-

[3] If the *Bowling* settlement were properly approved, by not opting out, petitioners would be bound by the terms of the *Bowling* settlement. On the other hand, if petitioners opted out of the *Bowling* settlement, they would not be bound by it.

signed to require the district court to ensure that only proper classes are certified, and only fair, legitimate class settlements are achieved. The Rule does not contemplate a *free market* system where class members, on the strength of the abbreviated disclosure in the notice to the class, must make a decision to "buy-in" and waive conditions set forth in the objections, or opt out and lose standing to object. If the courts below and respondents are correct in their interpretation of Rule 23(b)(3), there would be no need for the court to approve the settlement of a class action.

5. Respondents argue that class members should have had a crystal ball to tell them intervention is a requirement for objecting to a class certification and settlement, and that it is not necessary to provide in a notice to the class a warning that if class members do not formally intervene, whatever decision the district court might make will be binding, and unappealable.

The district court ordered that a notice be sent to the class that stated as a condition of participation in the Fairness Hearing that each class member must file written objections within a specified time period. Petitioners, through their counsel, complied with the notice. Thereafter, the district court established additional conditions for participation in the Fairness Hearing with which petitioners' counsel complied fully. There was nothing mentioned in the notice to the class or in any of the district court's proceedings that in order to appeal decisions of the district court, it would be necessary for class members to file a formal motion for intervention, Moreover, in light of existing precedent in the Sixth Circuit, such a motion would have been superfluous.[4]

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[4] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

Argument

The new rule now announced by the Sixth Circuit is that every absent class member in a Rule 23(b)(3) class action must intervene formally upon receipt of the notice of the class settlement, or the class member will have no standing to appeal any decision that the district court might make concerning the class certification and settlement and approval. In other words, the 50,000 or more class members who received notice in the *Bowling* case, although not told by the notice that intervention was a requirement, all were obliged to file formal motions to intervene if they wished to preserve their rights to seek review of the district court's procedural and substantive rulings. It is hard to believe that the framers of Rule 23 had such a cumbersome procedure in mind when the Rule was promulgated.

CONCLUSION

Petitioners seek only to have the procedural rulings of the district court reviewed on appeal. The *Kafkaesque* approach embraced by the district court and the Sixth Circuit has been designed to wear out petitioners, and to cause the expense of seeking to obtain even a single appellate decision that considers the merits of the district court's rulings, to be out of the reach of petitioners. The view in the courts below has been that the ends justify the means. Perhaps this will become the new motto of the federal courts, but if so, it is wrong,

The ruling of the Sixth Circuit in this case has wide-ranging implications to millions of future litigants, and it must be corrected. The current status of the law in the Sixth Circuit and possibly in other circuits is that all absent class members must become formal parties, through the cumbersome, litigious and expensive process of formal intervention or class members in a 23(b)(3) class action will have no standing to appeal any decision affecting their rights. This contradicts the mandate of Fed.R.Civ.P. 1, and it stands Rule 23 on its head.

This court must grant certiorari to rectify this far reaching and patently absurd interpretation of the standing of absent Rule 23(b)(3) class members to appeal, and indeed, even participate in hearings called to determine class certification and settlements.[5]

Respectfully submitted,

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[5] Under the logic of the Sixth Circuit's ruling, a class member who had no standing to appeal the district court's overruling of his proper objections to a class certification and approval of a settlement should likewise have no standing to even make the objections in the first place. If this is good law, why go to the trouble of conducting a Fairness Hearing; the district court would be unaccountable to any appellate court, and its determination that it acted properly would be final and binding.